No. 12,596

IN THE

United States Court of Appeals

For the Ninth Circuit

CHAN SHING HO, also known as Jack Chan,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

MULL & PIERCE,
A. M. MULL, JR.,
F. R. PIERCE,
515 Capital National Bank Building, Sacramento 14, California,
Attorneys for Appellant and Petitioner.

Subject Index

Page

I. Grounds for this petition 1

II. Argument 2

A. The evidence upon which the court relies to support the jury's verdict here is insufficient. The prosecution had the burden to prove the defendant's guilt to a moral certainty and beyond a reasonable doubt. The evidence cited falls far short of that quality or quantity 2

B. The court erred in holding that the government can prove a case of income tax evasion on the net worth theory under the facts shown in this case 9

C. Conclusion 13

Table of Authorities Cited

Pages

Bryan v. United States (1949), C.C.A. 5th Ct., 175 F. (2d) 223 11

United States v. Chapman (1948), C.C.A. 7th Ct., 168 F. (2d) 997 ..... 10, 11, 12

United States v. Fenwick (1949), C.C.A. 7th Ct., 177 F. (2d) 488 ..... 11, 12

No. 12,596

IN THE

United States Court of Appeals

For the Ninth Circuit

CHAN SHING HO, also known as Jack Chan,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable The United States Court of Appeals for the Ninth Circuit:

Appellant petitions the above entitled Court for a rehearing and in support of said petition respectfully shows:

I. GROUNDS FOR THIS PETITION.

It is respectfully urged:

(a) That the Court erred in holding that ANY evidence at all which is admissible is sufficient to justify a jury in bringing in a verdict of guilty in a criminal case; that it erred in stating that the evidence in the record justifies an inference "that all but appellant abandoned their interests or withdrew

from the enterprise"; that it erred in holding that the evidence justified the jury in determining that there had been a termination of the partnership in or after 1941.

(b) That the Court erred in holding that the government is justified in proving a case of income tax evasion on the net worth theory under the facts shown in this case.

II. ARGUMENT.

A. THE EVIDENCE UPON WHICH THE COURT RELIES TO SUPPORT THE JURY'S VERDICT HERE IS INSUFFICIENT. THE PROSECUTION HAD THE BURDEN TO PROVE THE DEFENDANT'S GUILT TO A MORAL CERTAINTY AND BEYOND A REASONABLE DOUBT. THE EVIDENCE CITED FALLS FAR SHORT OF THAT QUALITY OR QUANTITY.

This being a criminal case, the burden on the Government was to establish to a moral certainty and beyond all reasonable doubt that the defendant was guilty of income tax evasion. If the evidence was not sufficient to establish this then the appellant is entitled to a reversal.

A verdict cannot be sustained merely because there was some evidence which was admissible (and some admitted which was not) if that evidence considered with all of the evidence in the record was not sufficient to have justified reasonable persons to have found the defendant guilty to a moral certainty.

We submit that there was no evidence direct or circumstantial in this case which could have established to a moral certainty that "all but the appellant

abandoned their interests or withdrew from the enterprise" during the period in question.

There isn't even sufficient evidence to have gotten beyond a nonsuit in a civil action brought to establish such a termination of a partnership.

The defendant did not say the partnership had terminated in 1941. The statement which he did make as quoted in the Court's opinion: "Nobody wanted to stay in business. Too many bills, and then I take them all" when construed in the light (a) that the working partners quit their employment in the period from 1939 to 1941 (Appellant's Reply Brief p. 9), (b) that in five other places in the same statement the appellant said he had 10 partners in 1945 (Appellant's Reply Brief Appendix pp. i, ii), (c) that when the statement was submitted to him to correct he repeated this (Appellant's Reply Brief Appendix p. i), (d) that the statement is made by an inarticulate Chinese; makes no such construction of the statement reasonable. Certainly not sufficient to justify a conviction in a criminal case.

Had the defendant made a statement flatly asserting that the partnership terminated in 1941 and then at another time made another statement denying it, the jury might reasonably conclude that the assertion was the truth and the denial was untrue. But where a witness—especially an inarticulate Chinese—makes an ambiguous declaration and as a part of the same statement states over and over again that in 1945 he had 10 partners, no one can reasonably believe that he intended by his ambiguous statement to tell his in-

quisitors that the partnership had terminated in 1941. If that is proof of the fact beyond a reasonable doubt then truly the phrase has lost all rational meaning.

We have already argued that statements by two of the partners that they "understood" or "thought" they were out of the partnership are statements of conclusions. We cited authorities on pages 11-13 of appellant's reply brief to support the contention. Without reference to authority the Court has held that such statements are statements of fact.

We respectfully submit that the only facts testified to by these witnesses were as follows:

Henry Chan testified that he had left the employ of the partnership in 1939 to go in business for himself. He had no conversation with Mr. Chan about selling his interest in the partnership then nor until sometime after the war. When he did talk about it defendant said he didn't think he would buy him out. (Appellant's Reply Brief Appendix B p. iv.)

George Chan's testimony was that when he left the employ of the partnership nothing was said about its dissolution, and that as far as he was concerned there was no dissolution until he negotiated with Mr. Chan in March 1945 and a written agreement was made by his lawyer Mr. French. (Appellant's Reply Brief Appendix B p. v.)

Harry Young, another partner testified to the following FACTS: that he knew he was a partner; that he had worked for the partnership for a little while; that he attended a meeting of the partnership in 1940

at the Palace Market; that when he left the partnership employment nothing was said about a termination of the partnership. (Appellant's Reply Brief Appendix B, pp. vii, viii, ix.) That on January 11, 1947 he wrote a letter to Chan stating that he had a present share in the partnership and asking Chan to buy him out then. (Appellant's Opening Brief p. 21.)

Lai Ching Low was the next partner to testify. He is a San Francisco merchant. He was one of the original partners. He attended the partnership meeting in October 1940. He confirmed the facts as shown by the minutes of the transactions at that meeting. He testified that from the date of that meeting until the present there had never been any conversation, writing, act or deed constituting a termination of the partnership until 1947 when his interest had been bought out by the defendant.

The further fact that these partners attended a partnership meeting in 1940 and transacted partnership business and elected Mr. Chan manager of the business shows that there could have been no termination of the partnership when two of these same partners had expressed the *opinion* that they "thought" or "understood" themselves out of the partnership when they left its employ.

It is quite obvious that "thinking" yourself out of a partnership does not terminate the partnership. A partnership is terminated by (1) intent of the partners plus (2) acts which constitute a winding up of its affairs.

Assuming that the statement of opinions, upon which the Government, and now the Court, relies is sufficient evidence to justify the verdict of guilty of the jury, to be statement of facts, all that the evidence establishes is an intent—an expressed intent, negatived by every fact in the record.

One of the elements necessary to establish a termination of a partnership is still unproved, namely, an act or series of acts and deeds constituting a termination in fact and in law.

No matter how astutely and closely the evidence in the record is sifted there is no evidence whatever which establishes (either to a moral certainty or otherwise) any act sufficient to terminate an existing partnership.

The so-called circumstantial evidence is not evidence pointing to such acts at all.

It is said: "* * * circumstances point strongly to the nonexistence of the partnership in the crucial years."

1. The first circumstantial evidence pointed to is "After 1940 no partnership meeting was called and no financial statements issued".

How this points to a termination is beyond us. *Before* 1940 no meetings of the partnership were held and no financial statements were issued. The only reason partnership meetings were called in 1940 was because of Mr. Chan's absence in, and return from, China when he was placed again in complete charge and control of the market. The writer has been deal-

ing with business partnerships in a legal capacity for some twenty-eight years during which time as far as we can recall we have yet to hear of a formal partnership meeting being called by any partnership.

2. The opinion states: "Throughout the later period appellant conducted the market precisely as though it were wholly owned by himself. He managed the store and signed all the checks."

We respectfully submit that the evidence shows that throughout *the whole period of the existence of the partnership* from 1925 onward appellant conducted the market as though he owned it *except* during the latest period commencing in 1945 when various partners opened negotiations with Mr. Chan and were bought out one by one by contracts in writing, or after letters in writing, or as shown by the cancelled checks—all of which evidence *conforms exactly* to the piecemeal termination of the partnership as shown by the partnership income tax returns filed by the appellant. Therefore in this respect the circumstantial evidence is directly contrary to the Court's finding. If the manager of a meat market which is admittedly a partnership in 1941 continues to operate it in 1942, 1943 and 1944 exactly as he had operated it from 1925 to 1941 and then in 1945 and 1946-1947 he buys out various partners' interests, how can it be said that the manner of operation is circumstantial evidence of a termination? How can it be said that any significance attaches to the signing of checks when Mr. Chan *had always signed checks* (excepting when he was in China and temporary arrangements were made

for others to sign); when in any large partnership the managing partner usually signs checks?

3. It is stated "* * * Although admittedly the business was highly profitable during the years under consideration, he distributed no profits to any of the alleged partners and informed none of them that there were profits to be distributed. Nor did any of the supposed partners make any returns."

Does this show any ACT constituting a termination of the partnership? It DOES show that Mr. Chan appropriated partnership profits to his own use and it does show perhaps a wrongful failure to keep the partners informed and settle with them. It might even show an intent to hide profits from partners. But a circumstance which points strongly to a misappropriation of partnership funds can hardly be said to prove any act constituting a termination of the partnership—to a moral certainty and beyond a reasonable doubt or otherwise.

The Court says: "On the whole showing the jury were entitled to conclude that the profits he took were rightfully his." In the face of a record replete with dealings in 1945-1946 buying out partners as of that time and of the complete absence of any evidence showing an ACT of termination we do not see how such a conclusion can reasonably be drawn. To do so one would have to pile up inferences upon inferences.

B. THE COURT ERRED IN HOLDING THAT THE GOVERNMENT CAN PROVE A CASE OF INCOME TAX EVASION ON THE NET WORTH THEORY UNDER THE FACTS SHOWN IN THIS CASE.

From the outset of the investigation by the Government agents the defendant gave complete cooperation, turned over his complete set of books, in which there was a record of every transaction of the business during the whole of the period in question. Nothing was missing. The whole financial picture was there.

The special agents of the Government, stating that the books were inadequate but presenting no proof of the fact, disregarded all of the books completely and made out a case of income tax evasion based in all of its essential details upon what the agents said the defendant taxpayer has said about his assets and liabilities.

Many of these hearsay statements were shown to have been completely and admittedly incorrect.

Thus in this case, for the first time in any reported case that we have read we have the following situation:

The Government has been permitted to base a case of income tax evasion upon a "net-worth expenditure" basis (which is merely a series of asset and liability balance sheets) which balance sheets rest in all of their essential details (including "beginning net worth" and the statement of assets and liabilities throughout the period) upon what an agent has testified the taxpayer told him; in short, upon extrajudicial admissions. And this where the information has

been conclusively proven to be incorrect in numerous instances and also where in so presenting the case a complete set of books has been disregarded.

If this method of prosecution is upheld, it will establish a very dangerous precedent in income tax evasion jurisprudence. It will completely destroy the *corpus delicti* rule as applied to such cases. It will also shift the burden of proof in income tax evasion prosecutions.

The Court has stated: "No authority has been cited for this proposition" (i.e., the proposition that in a case like this the method is improper).

We have cited the case of *United States v. Chapman* (C.C.A. 7th Ct., June 18, 1948), 168 F. (2d) 997, where the Court says:

> "Appellant contends that 'In a net worth case the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to convict. We fully agree with this statement of the law." (Appellant's Opening Brief p. 117.)

The Revenue Agent's statement of the defendant's oral admission uncorroborated has been enough to convict in *this* case. There is not the slightest evidence concerning most of the items constituting Mr. Chan's beginning net worth in the record save and excepting the Revenue Agent's statement of what Mr. Chan is claimed to have told him. (Appellant's Opening Brief p. 63.)

The rule above quoted from the *Chapman* case has been disregarded; and the *Chapman* case is not even mentioned.

The next case that we cited was *Bryan v. United States* (1949), C.C.A. 5th Ct., 175 F. (2d) 223, holding that the net-worth expenditures method of proving income tax evasion can only be used where the computations of net worth at the beginning and end of the period can be accepted as being reasonably accurate. (Appellant's Opening Brief pp. 118, 119.)

Here the record shows conclusively that the evidence of beginning net worth as produced by the prosecution was grossly inaccurate (as we recall in oral argument certain of these inaccuracies were admitted) e.g., the value of equipment was listed at $22,009.50, its actual value being $500.00; various debts were included which were not then owed. (Appellant's Opening Brief pp. 67, 68.)

Thus the holding of the *Bryan* case has been disregarded, and the *Bryan* case is not even mentioned.

The next case that we cited was *United States v. Fenwick* (Nov. 1949), C.C.A. 7th Ct., 177 F. (2d) 488. (Appellant's Opening Brief p. 119.) In that case the Government used the "net-worth expenditure" method and relied on the testimony of extrajudicial admissions through the medium of having special agents testify to what the taxpayer was supposed to have told them.

This is just what was done here.

In our opening brief we quoted from the Court's opinion holding (1) That the Government must by competent evidence prove beyond reasonable doubt that the crime charged has actually been committed. (2) That the conviction cannot stand unless there is proof of the *corpus delicti,* existence of which cannot be established by an extrajudicial admission. (3) That in a net worth case the starting point must be based upon a solid foundation, the defendant's oral admissions being insufficient, citing *U. S. v. Chapman,* supra. (Appellant's Opening Brief p. 119.)

The ruling in the *Fenwick* case has not been followed by the Court here in its opinion. The facts in the *Fenwick* case are closely similar to the facts here. The methods of proof by the Government were identical. The case is not even mentioned.

As we have shown above the only evidence supporting substantially all of the figures used by the Government in constructing the net worth balance sheet which was the basis of the prosecution were extrajudicial admissions of the accused.

We have devoted many pages of our briefs to the citation of authorities that convictions based upon extrajudicial admissions and convictions cannot stand. (Appellant's Opening Brief pp. 95 et seq.; pp. 116 et seq.; Appellant's Reply Brief pp. 18 et seq.)

These authorities are not mentioned nor the point discussed in the Court's opinion. We believe the authorities are controlling in this case.

C. CONCLUSION.

In our Appellant's Reply Brief p. 6 we asserted the proposition "A mere scintilla of evidence is insufficient to support a verdict. The prosecution does not sustain its burden unless the evidence is sufficient to justify men and women of ordinary reason and fairness to find the defendant guilty to a moral certainty and beyond a reasonable doubt." We firmly believe and reassert that proposition to be sound law and applicable here.

After analysis this case reduces itself to this:

That the defendant has been found guilty of income tax evasion where the only proof of the all-important fact determinative of the issue, namely the termination at some unstated and indefinite time between 1941 and 1944 of a business partnership admittedly existing from 1925 to 1940 is:

(1) An extrajudicial admission of the defendant that "nobody wanted to stay in business. Too many bills, and then I take them all" made as a part of a written declaration that "in 1945 ten partners".

(2) The conclusions by two of the partners that they "understood" or "thought" they were out of the partnership by 1939 or 1941—where the record shows when they were stating facts and not opinions that no ACT occurred whatever from which they could draw this conclusion and also showed that they attended meetings of the partnership and participated in partnership affairs after they "understood" or "thought" they were out.

(3) Circumstantial evidence which shows acts and behavior by the defendant exactly the same as his acts and behavior during the period when admittedly the partnership was still in existence; acts which point to the conclusion that the defendant misappropriated his partner's funds but which do not even remotely point to any act which could be shown under the law to constitute a termination of a partnership.

It appears to us to be quite clear that these admissions and inferences upon inferences do not constitute enough proof of termination of a partnership so that a plaintiff in a civil action seeking to establish a termination of a partnership could even present a *prima facie* case of such termination.

It appears most certain to us that such proof falls far short of that quality and quantity which should be the minimum to support a verdict of guilty in a criminal case.

Of perhaps even more public importance is the invitation which the opinion in this case now extends to special agents of the United States Government to continue the practice begun here—to cast aside all other evidence and proof and present tax evasion cases upon the following formula or recipe:

(1) First obtain verbal or written extrajudicial admissions from the taxpayer;

(2) Interpret them as self-interest and the conscience of the agent may dictate;

(3) Obtain by independent means any single independent item of evidence of any asset or liability (to pay lip service to the *corpus delicti* rule).

With this formula—given an inarticulate Chinaman as the victim and a special agent so careless of the accuracy of his recollections that he finds the Chinese language written in dialects—all Constitutional safeguards to protect an accused become mere forms without substance.

Dated, Sacramento, California,
February 23, 1951.

Respectfully submitted,
MULL & PIERCE,
A. M. MULL, JR.,
F. R. PIERCE,
Attorneys for Appellant and Petitioner.

Certificate of Counsel

F. R. Pierce does hereby certify:

That he is an attorney at law duly authorized to practice in the United States Court of Appeals for the Ninth Circuit; that he is one of the attorneys of record and counsel for Chan Shing Ho, also known as Jack Chan, the Appellant in the within action; that he is the author of the within and foregoing Petition for Rehearing after judgment by said Court affirming the judgment of conviction of the United States District Court for the Northern District of California. That in the judgment of said F. R. Pierce said Petition for Rehearing is well founded and it is not interposed for delay.

Dated, Sacramento, California,
February 23, 1951.

F. R. Pierce,
Of Counsel for Appellant and Petitioner.